

Eng. Rep.]

JACKSON V. SPITTAL—WANHAM V. MACHIN.

[Eng. Rep.]

it in the case of defendants residing, or supposed to reside, within the jurisdiction. Then, by section 18, the statute assumes to deal with the case of defendants being British subjects residing out of the jurisdiction: "In case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons," &c. In thus legislating with regard to the writ of summons, which is the commencement of the suit, there is no restriction or alteration of jurisdiction, and the kind of action is not here mentioned: it is not otherwise limited than by the heading before section 2, to the series of sections from section 2 to section 25, inclusive. The only limitation of kind of action, therefore, is that it must be a personal action. Section 18, then, having dealt with the writ of summons and the issue of it, proceeds to deal with the further continuance of the suit:—"And it shall be lawful for the Court or judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of a breach of contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made, &c., to direct from time to time that the plaintiff shall be at liberty to proceed in the action," &c. The order of the judge is not an order to enable the plaintiff to bring an action. The action is already brought by the issue of the summons. The court has already assumed jurisdiction if the action be personal and touching a subject-matter within the ordinary jurisdiction of the court. The order in question is an order made in the cause directing that the plaintiff may proceed in the action, that is to say, proceed in the action already previously instituted. Then arises the question in dispute, which is,—What is the meaning of the phrase "a cause of the action?" Now, in the drawing of the Act, that phrase is made applicable to two subsidiary phrases. If the section were expanded, it would read thus: "That there is a cause of action which arose within the jurisdiction or a cause of action in respect of the breach of a contract made within the jurisdiction." In the second collocation the phrase "cause of action" clearly does not mean the whole cause of action as contended for on behalf of the defendant. It means the breach of contract, which breach occurs out of the jurisdiction. But if the phrase "a cause of action," when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? Can the same phrase have two different meanings? Is not the natural reading rather this, that it means the same thing when applied to both? It is that which in popular meaning, and for many purposes in legal meaning, is, "the cause of action," viz., the act on the part of the defendant which gives the plaintiff his cause of complaint. In the first collocation, that is supposed to occur within the jurisdiction, in the second without the jurisdiction. If this be the true construction of section 18, it is also the construction of section 19, which is applicable to foreigners. By so reading the sections they are

made applicable only to procedure, and not to jurisdiction. According to the title of the statute, and the recital of what it was intended to improve, they deal with the process and practice of the court. Section 24 shows that sections 18 and 19 are really substituted for the former intricate proceedings on a writ of *distringas* for the purpose of compelling appearance, or for proceeding to outlawry. If the construction contended for by the defendant be admitted, the statute, which is intended to apply only to the simplification of process and practice, is made to apply to jurisdiction; the phrase in the section which has been commented on is made to have two different meanings, and the jurisdiction of the superior court is limited and ousted by words in a statute, which, as it seems to us at least, do not clearly so enact. This last is contrary to a well-established rule of construction. For the reasons thus given, we are of opinion that the invariable practice of this court from the passage of the Act until now, has been and is correct, and that the Master's order in this case, staying further proceedings, was wrong and should be set aside.

Rule absolute.

CHANCERY.

WANHAM V. MACHIN.

Mortgage—Sale of mortgaged property—*Puise* incumbancers—Costs of sale.

In a foreclosure suit by the second of several successive incumbancers in which a sale was prayed, a decree was made and the estate sold, and the money paid into Court. Held, that the costs of the sale were not to be included in the costs of the suit, but each incumbancer was to add his costs of the sale to his debt and be paid his principal, interest and costs according to priority.

[18 W. R. 1028.]

This was a question as to what was properly comprised in the costs of a mortgagee's suit.

The suit was instituted by a second mortgagee for foreclosure of the equity of redemption in the mortgaged property, but prayed for a decree for a sale instead of foreclosure.

There were incumbancers subsequent in priority to the plaintiffs. A decree was taken for a sale, and the conditions of sale were prepared by one of the conveyancers to the Court. The conditions required the concurrence of the *puise* incumbancers in the conveyances to the purchaser. The property was put up for sale, and sold in lots to seven different purchasers, and the purchase money was paid into court.

The fund in court was sufficient to pay the first mortgagee his principal, interest and costs, but not sufficient to pay the principal, interest and costs of the plaintiffs in full.

It was not disputed that the fund in court must be applied first in payment of the costs of the suit, but the question was whether the costs of the sale as distinguished from those of the suit, and, in particular the cost of obtaining the concurrence of the *puise* incumbancers in the conveyances were to be added to the costs of the suit, or each incumbancer was only entitled to add his portion of such costs to his principal and interest.

Jessel, Q. C., and Batten appeared for the plaintiffs, and contended that the proper course